KETUA PENGARAH HASIL DALAM NEGERI

v.

MSDC SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: R2-14-6-1999]
8 AUGUST 2000

REVENUE LAW: *Income tax - Capital allowances - Training ground for driving institute - Whether a "plant" within sch. 3 Income Tax Act 1967 - Whether essential part of driving institute*

This was the appellant's appeal against the decision of the Special Commissioners of Income Tax. The Special Commissioners had found that expenditure incurred in the construction of the training ground for the respondent's driving institute qualified for capital allowance under sch. 3 of the Income Tax Act 1967.

Held:

[1] The fundamental test is that an apparatus will constitute a plant if it is the means by which a trading operation is carried out.

[2] The Special Commissioners had found that the training ground was prepared specially for carrying out the respondent's business of the driving institute. Without the training ground, the respondent would not be able to carry on its business. Thus, the finding of the Special Commissioners that the training ground was a "plant" which qualified for capital allowance under sch. 3 of the Act was correct.

[Appeal dismissed.]

Case(s) referred to:

Commissioners of Inland Revenue v. Scottish & Newcastle Breweries Ltd [1982] 55 TC 252 ***(refd)***

Cooke (HM Inspectors of Taxes) v. Beach Station Caravans Ltd [1974] 49 TC 514 ***(refd)***

Hinton (HM Inspectors of Taxes v. Maden and Ireland Ltd [1959] 1 WLR 875 ***(refd)***

Munby v. Furlong (HM Inspectors of Taxes) [1977] 2 All ER 953 ***(refd)***

Schofield (HM Inspector of Taxes) v. RH Hall Ltd [1974] 49 TC 538 ***(refd)***

Yarmouth v. France [1887] 19 QBD 647 ***(refd)***

Legislation referred to:
Finance Act 1971, ss. 41(1)(a), 47(1)
Income Tax Act 1967, sch. 3

Other source(s) referred to:
Income Tax, Whiteman, 1988, 3th edn, pp 30-33

For the appellant - Khairuddin Abdullah, Inland Revenue
For the respondent - Avatar Singh; M/s Mohd Latif & Assocs

Reported by Usha Thiagarajah

JUDGMENT

Faiza Tamby Chik J:

The respondent abovenamed, MSDC Sdn Bhd had appealed against the original notice of assessment raised by the director of inland revenue under the Income Tax Act 1967 ('the Act') and the hearing of which was held before the Special Commissioners of Income Tax, Kuala Lumpur on 15 November 1999. At the hearing, before the Special Commissioners of Income Tax, the issue for determination was whether capital expenditure incurred in constructing the school building and the training ground used for the purpose of the respondent's business qualifies for capital allowance under sch. 3 of the Act. The Special Commissioners of Income Tax found, based on the facts and law, that the school building did not qualify for capital allowance and also held that the training ground used for the purpose of the respondent's business does qualify for capital allowance. The appellant's appeal is against the decision of the Special Commissioners of Income Tax for finding that the training ground qualifies for capital allowance. The full facts are as found by the learned Special Commissioners of Income Tax at pp. 3 to 6 of the bundle of case stated by the Special Commissioners of Income Tax for determination by this court dated 16 December 1999 (referred to as the 'said case stated').

The court's duty in a case stated referred by the Special Commissioners of Income Tax can only be allowed if it is shown that the Special Commissioners of Income Tax's determination is erroneous in point of law. It is evident from the grounds of judgment of the Special Commissioners of Income Tax that they have considered and deliberated on all relevant issues of law and have applied correctly the law to the facts of this case. In *Schofield (HM Inspector of Taxes) v. RH Hall Ltd* [1974] 49 TC 538 at p. 546 Lowry CJ said:

> This Court can allow an appeal from the Commissioners' determination only if it is shown to be erroneous in point of law. The principles are stated by Lord Radcliffe in *Edwards v. Bairstow* [1956] AC 14, at pages 33-6 (where the question was whether a 'trade' existed as interpreted by the Income Tax

Act). The following rules can be readily deduced: 1. It is a question of law what meaning is to be given to the word 'plant' in the 1968 Act, and it is for the Courts to interpret its meaning, having regard to the context in which it occurs (including s. 14(1)). 2. The law does not supply a definition of plant or prescribe a detailed or exhaustive set of rules for application to any particular set of circumstances, and there are cases which, on the facts found, are capable of decision either way. 3. A decision in such a case is a decision on a question of fact and degree, and cannot be upset as being erroneous in point of law unless the Commissioners show by some reason they give or statement they make in the Case Stated that they have misunderstood or misapplied the law in some relevant particular. The simplest example of this is where there is an actual statement in the Case which shows that the Commissioners have misconceived the law and thereby misdirected themselves. 4. The Commissioners err in point of law when they make a finding which there is no evidence to support. The proper way to challenge a finding of this kind is to ensure that all the evidence which is alleged to support the finding is set out in the Case. The principle of *Emerson v. Hearty and Morgan* [1946] N. 1. 35 applies. 5. The Commissioners may also err by reaching a conclusion which is inconsistent with the facts which they have found. In all these cases it may be said that the true and only reasonable conclusion contradicts the determination. For, as Lord Radcliffe put it (at page 36(1)):

> If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

In *Commissioners of Inland Revenue v. Scottish & Newcastle Breweries Ltd* [1982] 55 TC 252 at pp. 270-271, Lord Wilberforce said:

The word 'plant' has frequently been used in fiscal and other legislation. It is one of a fairly category of words as to which no statutory definition is provided ('trade', 'office', even 'income' are others), so that it is left to the Court to interpret them. It naturally happens that as case follows case, and one extension leads to another, the meaning of the word gradually diverges from its natural or dictionary meaning. This is certainly true of 'plant'. No ordinary man, literate or semi-literate, would think that a horse, a swimming pool, moveable partitions, or even a dry dock was plant – yet each of these has been held to be so: so why not equally improbable items as murals, or tapestries, or chandeliers? The courts have over the years, provided themselves with some guidance in principle, starting with Lindley LJ kin *Yarmouth v. France* [1887] 19 QBD 647 at p. 658. Plant he said:

> in its ordinary sense ... includes whatever apparatus is used by a business man for carrying on his business, – not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business.

Later cases have revealed that a permanent structure may be plant (*Commissioners of Inland Revenue v. Barclay, Curle & Co Ltd* [1969] SC (HL) 30) and argument has ranged over the question whether, to constitute plant, an item of property must fulfil an active role or whether a passive role, will suffice – a distinction which led to some agreeable casuistry in relation to a swimming pool *(Cooke v. Beach Station Caravans Ltd* [1974] 1 WLR 1398). Perhaps the most useful discrimen, for present purposes, where we concerned with something done to premises, is to be found in that of 'setting': to provide a setting for the conduct of a trade or business is not to provide plant – *J Lyons & Co Ltd v. A-G* [1944] Ch 281, concerning electric lamps, sockets and cords for lighting a tea shop. But this, too, is not without difficulty. In the *Lyons* case itself Uthwatt J thought that different considerations (so that they might qualify as apparatus) might apply to certain specific lamps because they might 'be connected with the needs of the particular trade carried on upon the premises'. In *Jarrold v. John Good & Sons Ltd* [1963] 1 WLR 214, some fixed but moveable partitions though in a sense 'setting' were thought capable of being also 'apparatus'. And in *Schofield v. R & H Hall Ltd* 49 TC 538, the same argument was applied to the external walls of grain silos, as well as the connected machinery.

Another much used test word is "functional" – this is useful as expanding the notion of 'apparatus'; it was used by Lord Reid in *Barclay, Curle* (above). But this too must be considered, in itself, as inconclusive. Functional for what? Does the item serve a functional purpose in providing a setting? Or one for use in the trade? It is easy, without excessive imagination, to devise perplexing cases. A false ceiling designed to hide unsightly pipes is not plant, though the pipes themselves may be (*Hampton v. Fortes Autogrill Ltd* [1980] STC 80): is a tapestry hung on an unsightly wall any different from a painted mural?

And does it make a difference whether there was a damp patch underneath? What limit can be placed on attractions, interior or exterior, designed to make premises more pleasing, to the eye or other senses? There is no universal formula which can solve these puzzles. In the end each case must be resolved, in my opinion, by considering carefully the nature of the particular trade being carried on, and the relation of the expenditure to the promotion of the trade. I do not think that the courts should shrink, as a backstop, from a particular expenditure out of, in effect, taxpayers' money, and perhaps to me, on the Commissioners' findings, which are clear and emphatic, that the respondents' trade includes, and is intended to be furthered by, the provision of what may be called "atmosphere" or "ambience", which (rightly or wrongly) they think may attract customers. Such intangibles may in a very real and concrete sense be part of what the trader sets out, and spends money, to achieve. A good example might be a private clinic or hospital, where quiet and seclusion are provided, and charged for accordingly. One can well apply the "setting" test to these situations. The amenities and decoration in such a case as the present are not, by contrast with the *Lyons* case, the setting in which the trader carries on his business, but the setting which he offers to his customers for them to resort to and enjoy. That it is setting in the latter and not the former sense for which the money was spent is proved beyond doubt by the commissioners' findings.

I do not find it impossible to attribute to Parliament an intention to encourage by fiscal inducement the improvement of hotel amenity. Like the commissioners one may feel some doubt about individual items, for example, the seagull sculptures at the Atlantic Tower Hotel, Liverpool: decision cannot, I think, turn on whether they were moveable or fixed to the structure. But I would not differ from their hesitant conclusion that these artefacts have to be grouped with the other more prosaic objects and can, no less but no more artificially, be regarded as apparatus of the trade and so as plant.

At pp. 263-264 Lord Cameron said:

The determination of that issue, in my opinion, turns upon the proper interpretation to be given to the word in its context and in relation to the particular trade or profession or industry of the taxpayer. The right to receive the benefit of first year allowances is not limited in the Statute to manufacturing industry, in relation to which the use of the word 'plant' is familiar and normal – even if in given cases it may not be easy to determine what objects or items of property qualify for such description. Whatever meaning is to be attached to the word, the Statute makes it applicable to the widest variety of industrial and commercial undertaking as also to the exercise of a profession – see s. 47(1) of the Act of 1971. Many members of my own profession might well express surprise at the description of a law library as 'plant'. However that may be, it is clear enough that the word 'plant' is one which is intended to

be applicable to a much wider field of activities in industry and commerce than the word itself at first reading, would convey to a reader with the Oxford English Dictionary at his elbow. What, however, is 'plant' in the context of any particular trade is another matter. There are two major questions in the present appeal, the first whether the Commissioners misdirected themselves in law or whether, having accurately ascertained the law, they misapplied it and, second, whether in any event the decision at which they arrived is so unreasonable that no reasonable tribunal properly directed in law could arrive at it. ...

I think that the commissioners rightly applied their minds to the proper initial and fundamental questions which they had to answer – the meaning, of "plant" in its statutory context and as applicable to the trade carried on by the taxpayer. In so doing I think they rightly proceeded by using their point of departure in the search for the right answer to the questions posed in the present case the classic definition set out by Lindley LJ in *Yarmouth v. France* [1887] 19 QBD 647, at p. 658, which I make no apology for quoting since it has been generally accepted as providing as compendious and comprehensive a definition as can properly be made.

> There is no definition of 'plant' in the Act: [nor is there any in the Finance Act 1971] but, in its ordinary sense, it includes whatever apparatus is used by a businessman for carrying on his business, – not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business.

The word of Lindley LJ were adopted as a general test of the meaning of the word "plant" by the House of Lords in *Hinton (HM Inspectors of Taxes v. Maden and Ireland Ltd* [1959] 1 WLR 875; see per Lord Reid at p. 889 and Lord Jenkins at p. 898.

I think that much difficulty is caused by seeking to place limitative interpretations on the simple word 'plant': I do not think that the classic definition propounded in *Yarmouth v. France* suggests that it is a word which is other than of comprehensive meaning – 'whatever apparatus is used by a businessman for carrying on his business' – whatever the business may be. Here the business is not the buying or making for sale any industrial product, but the business of hotel keepers or operators of licensed premises and in so doing providing a variety of services of and commodities for the use and benefit of the customers of these businesses.

At p. 103 Lord Cameron again said:

In my opinion, in the present case, that of a taxpayer engaged in a service industry, it can be fairly and accurately said that this is precisely one of the services which the taxpayer offers and contracts to provide for his customers actual and prospective. I am further of the opinion that when the word 'setting' is used in such a case as that of an hotel-keeper or keeper of licensed premises,

> while the setting may be inextricably associated with or even be a fixed part of the structure in which the business is carried on, that provision of 'atmosphere' is just one of the ways in which the services offered and utilised are made palatable and attractive. The items of decor were acquired and were in a reasonable sense used to "manufacture" atmosphere by the fact of their presence, and in that sense they were in my view clearly part of the apparatus used by the taxpayer for carrying on his business. Consequently items or objects employed or used for that purpose in such a business may not improperly or unreasonably be regarded and treated as 'plant' of that business.

The Special Commissioners of Income Tax had considered in detail various authorities in determining whether the respondent's training ground which is used for the respondent's business constitute 'plant' to qualify for capital allowance. Reference is made to pp. 20 to 34 of the said case stated with which I concur. The main thrust of the appellant's contention seems to be that the Special Commissioners of Income Tax have erred when considering the meaning of "apparatus" in its definition of 'plant' in the Act. The appellant's contention that the word "apparatus" is limited to "machinery tool to the business" does not reflect the true position of the law as the appellant has failed to consider the statements of Lord Cameron and Lord Wilberforce in the *Commissioners of Inland Revenue v. Scottish & Newcastle Breweries Ltd* case. The Special Commissioners of Income Tax at p. 30 through p. 33 of the said case stated have considered in depth the meaning to be given whether an "apparatus" is plant, *ie*, as defined generally by Lindley LJ in *Yarmouth v. France* and developed by later cases as enumerated by Lord Wilberforce in the *Commissioners of Inland Revenue v. Scottish & Newcastle Breweries Ltd* case. I am in full agreement with the Special Commissioners in the principles and significant proposition in relation to the meaning of "plant" for capital allowance which are highlighted by Whiteman on *Income Tax*, 3rd edn, 1988. The principles are as stated in pp. 30 to 33 of the said case stated. In these principles, it is clear that whether an "apparatus" is plant has to be considered in relation to trading activities as a whole and/or all its constituent parts and appurtenances must be viewed as a whole. The fundamental test is that an apparatus will constitute plant if it fulfils the function of plant, in that it is the means by which a trading operation is carried out. The Special Commissioners of Income Tax based their finding on these principles as set out in their grounds of judgment and were fully satisfied that the respondent's training ground:

(i) prepared specially for carrying out the business of a driving institute plays an essential part in the business and satisfies the functional test adopted in several cases as discussed by the Special Commissioners of Income Tax;

(ii) is apparatus used in the conduct of the activities of the trade;

(iii) is an integral part of the respondent's business; and

(iv) is plant within the meaning of sch. 3 of the Act.

It must be observed that a question of fact cannot be brought at this stage before this court. In any case the Special Commissioners of Income Tax has found as a matter of fact that the training ground was prepared specifically for carrying out a driving institute which plays an essential part of the respondent's business and that it is an integral part of the respondent's business. It is quite obvious that without the training ground, the respondent would not be able to carry on their business of a driving institute.

The following cases clearly show further and fortify the respondent's contention that the training ground qualifies for capital allowance as it is a "plant" within the meaning of sch. 3 of the Act:

(a) *Commissioners of Inland Revenue v. Barclay, Curle Co Ltd* [1969] 45 TC 221

– where it was held that both items of expenditure for excavation and construction of dry dock were incurred on the provision of machinery or plant.

(b) *Cooke (HM Inspectors of Taxes) v. Beach Station Caravans Ltd* [1974] 49 TC 514

– where it was held that swimming pools were not merely passive but were part of the apparatus used by the company for carrying on its business and accordingly the commissioners' decision was correct.

(c) *Hinton (HM Inspectors of Taxes) v. Maden & Ireland Ltd* [1959] 38 TC 391

– where it was held that the knives and lasts were machinery or plant and expenditure on the knives and lasts was capital expenditure.

(d) In *Munby v. Furlong (HM Inspectors of Taxes)* [1977] 2 All ER 953).

The taxpayer commenced practice as a barrister on 1 September 1972. During the period 1 September to 31 August 1973 it was necessary for him to purchase certain law reports and textbooks to establish a library for the purpose of his practice. The textbooks were likely to be replaced by new editions in the future, although it would normally be between four and nine years before the new editions were purchased. The taxpayer claimed that the expenditure that he had incurred in purchasing the reports and textbooks was capital expenditure on the provision of "plant", within

the meaning of s. 41(1)(a) of the Finance Act 1971, and that accordingly he was entitled to an allowance in respect of the expenditure under ss. 41(1) and 47(1) of the 1971 Act.

Held – The word "plant" in s. 41(1)(a) of the 1971 Act extended to the apparatus or chattels which were used by a professional man in the day to day exercise of his profession. So interpreted, the word "plant" was not confined to objects which were used physically by a professional man but extended to objects used by him intellectually in the course of carrying on his profession and therefore included books purchased by a barrister for the purpose of his practice. It followed that the sum expended by the taxpayer in purchasing law reports and textbooks was capital expenditure which qualified for an allowance under s. 41(1) of the 1971 Act (see p. 956 e to h, p. 957 f and g, p. 959 e and h and p. 960 c to g, post).

After a careful review of the cases I am of the opinion that the decision of the Special Commissioners of Income Tax is correct that the respondent's training ground used for the respondent's business is a "plant" which qualifies for capital allowance under sch. 3 of the Act. I would for these reasons dismiss the appeal with costs.